No. 20,508

United States Court of Appeals

For the Ninth Circuit

MASTER TRANSMISSION REBUILDING CORPORATION & MASTER PARTS, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside an Order of the National Labor Relations Board

PETITIONER'S BRIEF

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JURISDICTIONAL STATEMENT

The Petitioner, Master Transmission Rebuilding Corporation & Master Parts, Inc. (herein referred to as "Employer") petitioned this Court to review and set aside an Order of the National Labor Relations Board (herein referred to as the "Board") issued on October 28, 1965, pursuant to Section 10(c) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. sec. 151 et seq. The Board has petitioned for enforcement of its Order (RT page 94). This Court's jurisdiction is based upon sec. 10(f) of the Act. The Board's Order is reported at 60 LRRM 1317; 155 NLRB 35; TR page 49. All acts and con-

duct alleged to be unfair labor practices occurred in the City of Fresno, County of Fresno, State of California and within the Ninth Circuit.

STATEMENT OF THE CASE

The following facts are not in dispute. Petitioner is a California corporation, engaged in the business of rebuilding transmissions. Mr. Rowland is the chief executive officer. All matters of important Company policy are determined by him. He was solely responsible for labor relations policies. His plant supervisor was clothed with authority only with respect to production and sales. Prior to January 22, 1964,[1] the International Association of Machinists, AFL-CIO, District Lodge No. 87 (hereinafter referred to as the "Union") engaged in an organizational drive to organize the employees of petitioner. On or about January 22, the Union obtained 15 authorization cards executed by employees, authorizing the Union to be their collective bargaining representative. On January 22, the Union mailed a letter to the Employer, requesting recognition and asking the Employer to bargain with said Union. The letter was received in the offices of petitioner on January 27. The president of the petitioner corporation was absent from the city on an extended business trip from January 22 to February 5. On February 4, the Union filed a Representation Petition with the National Labor Relations

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[1]All dates set forth in this brief are in 1964 unless otherwise designated.

Board pursuant to Section 9(e) of the Act. On February 5, the petitioning president (sometimes referred to as "Employer") received the Petition for Election and later the same day received the letter from the Union demanding recognition and bargaining (G.C. Exh. 17A). On February 14, the Employer entered into a Consent Agreement, consenting to the National Labor Relations Board election and the National Labor Relations Board election was held on February 24. The tally of ballots (G.C. Exh. 21A) shows that the vote was 12 votes against the Union, 6 votes for the Union, and 1 vote challenged. Thereafter, on February 28, the Union filed Objections to the election, alleging conduct affecting the results thereof. On September 21, the Regional Director set aside the results of the election. Prior thereto, on February 7, the Union filed Unfair Labor Practice Charges, alleging that the Employer had unlawfully discharged employees James C. Smith and Timothy Tyler, Jr., in violation of Sections 8(a)(1) and (3) of the Act. A First Amended Charge was filed on March 2, alleging that the Employer had refused to bargain with the Union, in violation of section 8(a)(5) of the Act. A Second Amended Charge was filed on June 1, re-alleging discriminatory discharge of Tyler only and violations of 8(a)(1) and (3), 8(a)(2) and 8(a)(5) of the Act, but did not allege the unlawful termination of Tyler or Smith or an 8(a)(3) violation. On September 23, 24 and 25, a hearing was held in Fresno, California before Trial Examiner David Doyle, in Case No. 20-CA-2974. The Trial Examiner issued his Decision on June 23, 1965 and found the petitioner

guilty of violating Sections 8(a)(1)and 8(a)(3) of the Act. Said Decision held that the petitioner had not violated Sections 8(a)(5) or 8(a)(2) of the Act and certain conduct which had been alleged to be in violation of 8(a)(1) and (3). The petitioner was willing to accept this Decision; however, the General Counsel filed Exceptions to the Trial Examiner's Decision on July 28, 1965. The National Labor Relations Board, in its Decision and Order, rendered on October 28, 1965 (cited at 60 LRRM 1317, 155 NLRB 35) upheld the Trial Examiner in regard to certain 8(a)(1) and (3) violations and reversed the Trial Examiner and held that the Employer was also guilty of violation of Sections 8(a)(2) and 8(a)(5) of the Act and other 8(a)(1) and (3) conduct.

All acts alleged to be unfair labor practices occurred in the County of Fresno, State of California, and are within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

POINTS RELIED ON FOR REVERSAL OF THE BOARD'S DECISION AND ORDER AND AUTHORITIES

I

The substantial evidence does not support the Board's reversal of the Trial Examiner's findings and conclusions.

II

(a) The Board's decision that Petitioner violated Section 8(a)(5) of the Labor-Management Relations

Act, as Amended, contrary to the Decision of the Trial Examiner, is not supported by the substantial evidence and is contrary to law.

(b) The substantial evidence does not support the Employer's lack of good faith doubt of the Union's majority status when he was found by the Board to have refused to bargain.

(c) The National Labor Relations Board erred in considering signed authorization cards as proof of majority status.

(d) The Board's Order, requiring the Employer to bargain with the Union, violates the rights of the employees as guaranteed by Section 7 of the Act.

III

The Board erred in reversing the Trial Examiner and finding the Employer violated Section 8(a)(1) and 8(a)(3) of the Act.

IV

The Board erred in reversing the Trial Examiner and finding the Employer violated Section 8(a)(2) of the Act.

V

The Board erred in applying the Bernel Foam Products Doctrine and making its Order requiring Petitioner to bargain.

ARGUMENT

I

THE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE BOARD'S REVERSAL OF THE TRIAL EXAMINER'S FINDINGS AND CONCLUSIONS.

Occasionally, the National Labor Relations Board, in its reversal of a Trial Examiner, so completely ignores the substantial evidence, the record screams a mute appeal for reversal. This is such a case.

The Board, in this case, did not assume the reasonableness and fairness of the findings and conclusions of its experienced Trial Examiner. The Trial Examiner found that the Employer did not violate Section 8(a)(5). He found that the Union's loss of a majority status was occasioned by the vigorous anti-union campaign of employees Wilson and Nuzzolese. He found that the Employer did not refuse to bargain and engage in unfair labor practices for purposes of delay in order to undermine the Union's majority. He found that the posting of the tardiness notice was not an 8(a)(1) violation. He found that no violation of the Act occurred after February 7, 1964 as the result of Mr. Rowland's threatened reduction in overtime. He did not credit employee Napier's testimony that the Employer representative had threatened to close the plant. He concluded that the employees' rights under Section 7 of the Act would be violated if an order to bargain was made. These findings are supported by substantial evidence, are based on the assessment of credibility of the witnesses, are questions of fact, were formed by the experienced Trial Examiner who gave weight to the evidence in ac-

cordance with its context, and who under all the circumstances of the case was the only person physically capable of evaluating the evidence and giving to it its true import, construction and interpretation.

In *Universal Camera v. NLRB,* 340 US, at 493, the Supreme Court of the United States held:

> "It is therefore difficult to escape the conclusion that the plain language of the statutes directs a reviewing court to determine the substantiality of evidence on the record including the examiner's report."

On the weight to be given a trial examiner's report in applying the substantial evidence standard, the Court said:

> "We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. *We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.* The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial.'" (Pages 496 and 497) (Italics added).

Upon remand, Judge Learned Hand, for the Court (190 F. 2d 429 at 430), stated:

> "Perhaps as good a way as any to state the change effected by the amendment [1947 amendment to § 10(e) of National Labor Relations Act, 29 U.S.C. § 160(e), making findings of Board conclusive 'if supported by substantial evidence on the record considered as a whole'] is to say that we are not to be reluctant to insist that the examiner's findings on veracity must not be overruled without a very substantial preponderance in the testimony as recorded."

In *NLRB v. Brown,* 380 US 278, 15 LRRM 2663, the Supreme Court, on March 29, 1965, said:

> "Courts are expressly empowered to enforce, modify or set aside, in whole or in part, the Board's orders, except that the findings of the Board with respect to questions of fact, if support by substantial evidence on the record considered as a whole, shall be conclusive. National Labor Relations Act, as amended, §§ 10(e), (f), 29 U.S.C. 160(e), (f) (1958 ed.). Courts should be 'slow to overturn an administrative decision,' Labor Board v. Babcock & Wilcox Co., 351 U.S. 105, 112, 38 LRRM 2001, but they are not left 'to "sheer acceptance" of the Board's conclusions,' Republic Aviation Corp. v. Labor Board, 324 U.S. 793, 803, 16 LRRM 620. Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully

> review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole."

In *NLRB v. Cactus Petroleum Inc.,* 61 LRRM 2305, the Court refused enforcement of the Board's 8(a)(5) findings and order to bargain, because the evidence did not show that the union represented a majority when the employer refused to bargain, stating:

> ". . . The record is devoid of any evidence showing that the dissipation of the Union majority can be attributed to any act of the employer . . . Our task is complicated somewhat by the fact that the Board's order directly contravened the decision of the Trial Examiner."

In *American Ship Building Co. v. NLRB,* 380 US 300, 58 LRRM 2672, the Board, contrary to the Trial Examiner, found that the respondent had no reasonable basis for fearing a strike. Justice Goldberg, in his concurring opinion, stated:

> "The sum of all this is that the record does not supply even a scintilla of, let alone any substantial, evidence to support the conclusion of the Board . . . but, rather, this conclusion appears irrational."

In the case at bar, the Board not only has "failed to assume the reasonableness and fairness of the Trial Examiner's findings", *it has disregarded them and given them no weight whatsoever.* These findings are evidence. They are evidence of the most important

kind, inasmuch as they represent the application of the Examiner's judgment of credibility. So, also, they represent his judgment of giving weight to the evidence in its proper context. It was he who observed the demeanor of the witness, the witness' intelligence, his physical response on cross-examination, and his frankness and trustworthiness.

This function of trial cannot be done in the sterile atmosphere of the Board, 2,500 miles distant from the witness. The history and tradition of our law has always given to those on the scene important powers with respect to credibility and the weight and interpretation of evidence.

The findings of the Board do violence to this time tested system of trial procedure.

There is not only no substantial preponderance of evidence in the record negating the Trial Examiner's findings on veracity and weight, there is none at all. The degree to which the Board had to "pick" at the testimony and evidence to find facts and inferences to support its decision all too well demonstrate its inability to find substantial evidence to support its findings from the record as a whole.

It is submitted that the Trial Examiner's decision based upon his "on the spot" appraisal of veracity and weight of evidence should prevail.

The appeal should be sustained and the order of enforcement denied.

Inasmuch as each of the succeeding arguments involve in some measure the test of credibility, the

evaluation of evidence in its proper context and the reasonableness of the inferences drawn therefrom, they will be discussed in connection with the findings and conclusions to which they apply.

II

(a) The Board's Decision That Petitioner Violated Section 8(a)(5) of the Labor-Management Relations Act, as Amended, Contrary to the Decision of the Trial Examiner, Is Not Supported by the Substantial Evidence and Is Contrary to Law.

The Trial Examiner, in his Decision and Order issued June 23, 1965, found that the Union did not represent the majority of the employees within the appropriate unit after February 4 (TXD 13:59, 60; TR[2] Vol. 1:34.)

The National Labor Relations Board, in its Decision dated October 28, 1965, found that the Employer was guilty of refusal to bargain on February 5, 1964 (BD page 9; TR Vol. 1:57), and made its Order requiring the Employer to bargain.

The evidence discloses that the Union had obtained 15 signed authorization cards on or about January 22, 1964, and further shows that on February 5, 1964, when Mr. Rowland, President of Petitioner, was found by the Board to have refused to bargain, the Union no longer represented a majority of the employees in the unit. Prior to and including February 5, 1964, a group of employees who were opposed to the Union vigorously campaigned against the Union and

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[2]TR refers to Vol. I of the Transcript of Record.

circulated an anti-Union Petition. Said anti-Union Petition contained the signatures of 13 employees. One of these employees, Fred Coons, was not a part of the appropriate unit, thus said anti-Union Petition contained 12 valid signatures. On this date, there were 20 employees in the unit. Five of the employees who signed this anti-Union Petition had previously signed Union authorization cards. They were employees Viayno, Eagles, Anderson, Williams and Hill (TXD 13:55; TR Vol. 1:34.) Of the 15 employees who previously had signed authorization cards, two were no longer employed by the Employer on February 5, 1964; therefore, there remained only 8 valid authorization cards (as found by TXD 13:55-60; TR Vol. 1:34); the execution of the anti-Union Petition by the 5 employees constituted an effective repudiation of the Union.

Fort Smith Broadcasting Company v. NLRB, 341 F. 2d 874, holds that an employee's subsequent change of heart or afterthoughts can destroy the majority status of the Union. In this case, the Court found that the Union's majority status was destroyed when an employee who signed the Union card "changed his mind." In view of the employee's obvious defection from the Union, it is clear that the Employer would have committed unfair labor practices, should he engage in negotiations with or enter into a contract with a minority Union on February 5, 1964.

Int. Ladies & Garment Workers Union, AFL v. NLRB, 366 US 731;

Glendale Manufacturing Co. v. Local 520, 283 F. 2d, 936, 939; certiorari denied at 366 US 960.

The Union's loss of majority status is a fact accepted even by the Board (BD p. 5; TR Vol. 1:53). The question then is simply what caused this loss of majority. It is incumbent upon the National Labor Relations Board to show some causal relationship between alleged unfair labor practices and the Union's loss of majority status.

NLRB v. Hanna Ford Bros. Co., 261 F. 2d 638, 643;

NLRB v. Abrasive Savage Co., 285 F. 2d 552.

The Board, in its Decision, stated:

> "It may be true that the campaign of employees Wilson and Nuzzolese against the Union may have had some bearing on the Union's loss of majority. But this is a matter of speculation." (BD p. 6; TR Vol. 1:54.)

The Trial Examiner credited the testimony of Wilson and Nuzzolese and found that the loss of majority was occasioned by the

> *". . . vigorous anti-union campaign of Wilson and Nuzzolese which was an independent, intervening cause of the election results."* (TXD 14:5; TR Vol. 1:35).

The Board states in its Decision:

> "The fact remains that the Union achieved its majority status notwithstanding the counter-activities of these two employees, and it was not until Respondent intervened on the campaign and engaged in unlawful coercive conduct that there is evidence of employee defection from the Union." (BD p. 6; TR Vol. 1:54.)

This statement by the Board is contrary to the substantial evidence. The Union did not achieve its majority status under the evidence "notwithstanding the counter-activities of these two employees." The facts and the testimony show that it was the counter-activities of these two employees which resulted in a loss of majority by the Union, as evidenced by the fact that 5 employees who signed authorization cards, did, on February 5, 1964, sign the anti-Union Petition. Wilson's credible testimony showed that these employees changed their minds or had never made up their minds at the time they executed authorization cards (RT 194, 242; Resp. Exhibit 2.) These are not "speculations." They are established facts.

(b) The Substantial Evidence Does Not Support the Employer's Lack of Good Faith Doubt of the Union's Majority Status When He Was Found by the Board to Have Refused to Bargain.

It is well established that the law will impose no duty to bargain with the Union upon request if the Employer has a good faith doubt of the Union's majority.

The Board, in its Decision (BD page 5; TR Vol. 1:53), states:

> "In this case there is not only the lack of evidence showing a good-faith doubt, but affirmative evidence showing Respondent to have engaged in the unfair labor practices . . . whose foreseeable consequence was the destruction of the Union's majority status."

This statement is unsupported by the evidence. The Union's loss of majority was already evident on

February 5, 1964 (TXD 13:60; TR Vol. 1:34), and was occasioned by the anti-Union campaign of certain employees. The evidence shows that the Employer, on February 5, 1964, had a good faith doubt of the Union's majority status. A good faith doubt or lack thereof must exist at the time the Employer refuses to bargain or refuses to recognize the Union. The Board found this refusal to have occurred on February 5, 1964 (BD page 9, par. 8.) The record discloses *not one single act* on the 5th that can be interpreted as a refusal to bargain.

A good faith doubt is a state of mind. The only item in the record that shows that the Union claimed a majority is the Union's letter (Gen. Counsel's 17A) which claimed they represented a majority of the employees and requested recognition. The Union at no time made any effort to prove its majority status. In fact, this was the only communication made by the Union to the Employer. The Union did not offer to prove its majority status by submitting authorization cards. The Union at no time stated it ever had authorization cards, nor did it in any way attempt to show by what method or means it represented a majority.

On February 4, 1964, the Union filed an Election Petition which was received by the Employer and opened prior to his opening General Counsel's 17A. The Trial Examiner stated that this was

> ". . . certainly not the typical card-check case, in which an employer refuses to engage in a card check, offered by the Union and insists on the election procedure for purposes of delay, which the employer uses to undermine the Union's ma-

> jority. Here, there is no such proffered card-check. In its letter of January 22 the Union demanded recognition and bargaining; it *claimed* a majority in the unit but made no offer to *prove it* in any way. The petition of the Union supplied that deficiency, the election procedure was the *one* and *only* way selected by the Union to prove its majority."

It would appear from the foregoing that the Trial Examiner felt there was a good faith doubt, although he did not specifically rule on this point, since he found the Union did not represent a majority on or after February 4, 1964.

We submit that there was no decision made to refuse to bargain or not to bargain on February 5, 1964. The only decision that was made was made on February 6, 1964 when the Employer's counsel wrote to the Union and agreed to consent to an election and was willing to discuss discharges of Timothy T. Tyler and Jimmy C. Smith.[3] It is important to note that the Union never replied to this request.

As evidence of good faith doubt on February 5, 1964, the record shows that Mr. Rowland never believed the Union represented a majority[4] (RT 481:23, 24; 477:7-10; 402:1-9; 401:23-25; 423:5-17.)

The extrinsic evidence also supports the fact that not only was there a good faith doubt but as a matter of fact, the Union had lost its majority status on February 5, 1964. The anti-Union Petition contained

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[3]Not involved in this proceeding.

[4]RT refers to the original Reporter's Transcript, which is Vol. II of the Transcript of Record.

13 signatures. One signature was not appropriate; therefore, there were 12 valid signatures on the anti-Union Petition on February 5, 1964 in a unit of 18 employees. On February 24, 1964, there were exactly 12 votes cast against the Union; there were 6 votes cast for the Union, with 1 challenged ballot, so it is apparent that the exact results were obtained in the election as was evidenced by the anti-Union Petition on February 5, 1964 (after removing from those eligible the terminated employees, Tyler and Smith, who left prior to February 5.) There is nothing in the record on February 5 to show bad faith. The evidence is uncontradicted that Rowland had reason to believe the issue of the "majority" was to be decided by a Board Election. It was not the act of the Employer, but rather the act of the Union which resulted in an election being held.

(c) The National Labor Relations Board Erred in Considering Signed Authorization Cards as Proof of Majority Status.

It is apparent that the present policy of the Board is to consider Union authorization cards as the equivalent of votes. This concept can, and in this case will, result in forcing an unwanted Union upon the majority of the employees in the appropriate unit. The validity of authorization cards was discussed by the Chairman of the National Labor Relations Board, Mr. McColloch, in an address before the Labor Relations section of the *American Bar Association* in 1962, wherein he stated:

> "In 58 elections, the unions presented authorization cards from 30 to 50% of the employees; and they won 11 or 19% of them.

"In 87 elections, the unions presented authorization cards from 50 to 70% of the employees; and they won 42 or 52% of them.

"In 57 elections the union presented authorization cards from over 70% of the employees and they won 42 or 74% of them."

(1962 Proceedings, Section of Labor Relations Law, American Bar Association, pp. 14, 17.)

Further evidence of the unreliability of authorization cards can be shown by the testimony of employee Wilson who stated that many of the employees were strictly on the fence and that they had not made up their minds (RT 194, 242).

We believe it more important that there should be no obligation imposed upon an Employer to bargain unless the Union offers to prove its majority status. In all cases cited by the Board, the Union had either offered a card check and the Employer refused to bargain, or had in some other manner offered to prove the Union majority status. In the following cases, the courts found signed authorization cards not sufficient to justify a bargaining order:

NLRB v. Flomatic Corp., C.A. 2, 1965, 59 LRRM 2535;

NLRB v. A. & P. Tea Co., C.A. 5, 1965, 59 LRRM 2506;

NLRB v. Johnnie's Poultry Co., C.A. 8, 1965, 59 LRRM 2117;

NLRB v. Peterson Bros., Inc., C.A. 5, 58 LRRM 2570.

Even in cases where the Board made an order to bargain, there was clear evidence of majority status—an offer by the union to prove its majority by check-off of authorization cards, facts not found in this case.

Bernel Foam Products, NLRB 1964, 56 LRRM 1039;

Colson Corp. v. NLRB, 59 LRRM 2512, cert. denied at 60 LRRM 2353;

I.U.E. v. NLRB, 59 LRRM 2232, cert. denied by U.S. Supreme Court 60 LRRM 2353;

Irving Air Chute, 57 LRRM 1330.

This Court should carefully scrutinize this controversial policy of the Board, requiring the Employer to bargain with a Union on the basis of authorization cards alone, especially in this case where there was no offer to prove the majority status or the validity of the authorization cards.

The Union or the Board's regional offices at no time told the Employer prior to the alleged refusal to bargain that the Union possessed authorization cards or in what manner it claimed to represent a majority. To impute such knowledge to the Employer is unreasonable and an abuse of the Board's discretion.

(d) The Board's Order, Requiring the Employer to Bargain With the Union, Violates the Rights of the Employees as Guaranteed by Section 7 of the Act.

Section 7 of the Act states:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other con-

certed activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to *refrain from any or all of such activities . . .*" (Emphasis added.)

The Trial Examiner, in discussing the activities of the two groups, one for the Union and the other against, stated as follows:

"Each of these groups had the right under Section 7 of the Act to pursue these lawful objectives, and neither group enjoys a right to preferred treatment under the Act at the hands of the Board. Under the circumstances here, I cannot see how the Board can favor one group of employees over the other, without depriving the other group of its statutory rights under Section 7 of the Act. The facts here, in my judgment, warrant the Board in issuing an order remedying the unfair labor practices, with a new election to be ordered when the effects of the unfair labor practices have been dissipated. An order to this Company to bargain with the Union as the collective bargaining representative of *all* the men in this unit, would do violence to the rights of the majority, as evidenced by the anti-union petition and the election tally." (TDX 14:10-20; TR Vol. 1:35.)

The Trial Examiner further stated:

". . . it seems clear, and I find, that this conduct of the five employees, in signing the anti-union petition effectively withdrew their authorization cards from any count to determine majority in the unit. Furthermore, the election by secret ballot proved that the Union no longer possessed the adherence of these five employees. Therefore, I

find, that the Union never possessed a majority in the appropriate unit of employees after February 4." (TXD 13:55-60; TR Vol. 1:34.)

The result of the Board's Order to Bargain contrary to the majority wishes is to accomplish a de facto certification of the Union as the collective bargaining representative by unfair labor practice procedure, rather than by using the representation procedure of the Act as set forth in Section 9 of the Act.

In *International Ladies Garment Workers Union v. NLRB,* 366 US 731 (1961), the U. S. Supreme Court affirmed and enforced an order of the National Labor Relations Board penalizing an Employer despite its good faith belief that the Union it bargained with had a majority. The Board ordered the Employer to withdraw recognition from the Union and found violations of Sections 8(a)(1) and 9(a)(2) of the Act. This Court said (at pages 737 and 738) that the Employer had

> ". . . granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgement of Section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain' from such activity. It follows without need of further demonstration that the employer activity found present here violated Section 8(a)(1) of the Act which prohibits employer interference with, and restraint of employee exercise of Section 7 rights."

In the face of this decision, the Board's Order requiring the Employer to bargain denies the Petitioner of any right to have the question of representation and unit questions decided by the Board under Section 9 and requires the Petitioner to take the risk of violating the law if it recognizes a union which only represents a minority.

The Board, in its Decision (on page 5), admits the loss of union majority. The Trial Examiner, as set forth above, found that the Union did not represent a majority after February 4. Therefore, such an order by the Board is in the form of a penalty against the Employer for allegedly engaging in unfair labor practices. This, standing alone, negates the purposes of the Act. It results in forcing an unwanted union upon the majority of the employees. It was a violation of Section 7 and exceeds the scope of the powers of the National Labor Relations Board.

III

THE BOARD ERRED IN REVERSING THE TRIAL EXAMINER AND FINDING THE EMPLOYER VIOLATED SECTIONS 8(a)(1) AND 8(a)(3) OF THE ACT.

The Trial Examiner, in his Decision and Order dated October 28, 1965, found that the following conduct violated the Act:

> (1) The interrogation of employee Dale Chevoya, on or about January 27, 1964, by Messrs. MacGuinigie, Lawley and Young.

(2) The interrogation of employee C. S. Napier, on or about January 27, 1964, by Mr. Lawley.

(3) Mr. Frank Rowland's speech of February 5, 1964 in which he reduced overtime hours.

Agreeing with the Trial Examiner's Decision, the Board found violations of Sections 8(a)(1) and 8(a)(3) as a result of the above Employer conduct.

This Petitioner, in writing, agreed with the Regional Board to enter into a Settlement Agreement, post the notices, and accept the decision of the Trial Examiner. However, the General Counsel for the Board filed Exceptions to the Trial Examiner's Decision and Order, on July 28, 1965.

The Board, in its Decision and Order, affirmed the decision of the Trial Examiner and found that the above three acts by the Employer were in violation of the Act. However, the Board in its Decision and Order found that in addition to the acts found to have been a violation by the Trial Examiner, that the Employer was also guilty of violating Sections 8(a)(5) and 8(a)(2), and found additional acts constituting violations of Sections 8(a)(1) and 8(a)(3).

Insofar as the violations found by the Trial Examiner, the interrogations of Chevoya and Napier, on or about January 27, 1964, were prior to any claim of representation by the Union, or any demand for bargaining. The Board has a long standing policy that it will not consider employers' conduct, for the purposes of setting aside an election, which occurred

prior to the filing of the petition for an election. The Petition for Election was filed on February 4, 1964. These prior, isolated interrogations should not be considered for purposes of the Board setting aside the election, ordering a new election, or making its order to bargain.

NLRB v. Goodyear Tire & Rubber Co., 138 NLRB 59, 51 LRRM 1071.

In the *Goodyear* case, the Board stated:

"The filing of the petition should be clear notice in all cases that objectionable conduct is thereafter taboo."

Prior to the *Goodyear* decision, the Board would not consider any employer conduct prior to the union's execution of a consent agreement. A Consent Agreement was executed in this case on February 14.

Section 8(c) of the Act provides:

"The expressing of any *views, argument, or opinion,* or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." (Italics added.)

The isolated statements of supervisors Lawley and MacGuinigie, who had no authority or responsibility in the field of labor relations (RT 399:5-17), should not be sufficient for the Board to set aside an election and make its order requiring the Employer to bargain with the Union.

In *Morgantown Full Fashioned Hosiery Co.*, 33 LRRM 1421, it is said:

> "While the Board has frequently referred to its elections as conducted in a 'laboratory atmosphere', the adoption of a laboratory standard should not be construed to mean that the Board will ignore the realities of industrial life. In this respect, we are not unmindful of the fact that the 'laboratory' for election purposes is usually an industrial plant where vigorous campaigning and discussion normally take place, and where isolated deviations from the above-mentioned standard will sometimes arise, notwithstanding the best directed efforts to prevent their occurrence. In view thereof, we are of the opinion that an employee mandate cannot be lightly set aside merely because the normal and expected plant discussion happens to include a few isolated threats by over-zealous minor supervisory personnel."

The Trial Examiner (TXD 10:5-10; TR Vol. 1:31) held that the tardiness notice which was aimed at Chevoya was justified, well merited, and did not violate the Act. The Board reversed this finding and conclusion.

The February 5, 1964 speech of Mr. Rowland was found by the Trial Examiner to have violated Section 8(a)(3) of the Act because he threatened to reduce the work week from 46½ hours to 40 hours per week. The evidence is uncontroverted that the employees were engaged in "make-work programs"; "that there was a shortage of cores"; "that they would have to reduce hours unless the Employer obtained more

cores"; and "that there was sufficient economic reason for this economic reduction." However, it was found that there was also a discriminatory aspect and the Trial Examiner found that this was a violation of Section 8(a)(3).

The Trial Examiner found and credited the testimony of Mr. Rowland and held that Mr. Rowland, on February 7, effectively retracted this statement and his threats, stating:

> "Of all the witnesses, Rowland, president of the Company, testified in the most forthright and candid manner. His testimony as to his course of conduct is clear, and consistent with the undisputed facts and other evidence, also it is substantially the same as Rowland gave in a sworn statement to Field Examiner Towhey on March 7, when Rowland was interviewed without the assistance of his counsel. I credit Rowland's entire testimony; however, his testimony discloses that in some particulars, his conduct violated certain sections of the Act, but as to other items of his conduct, I accept his explanation." (TXD 11:59-12:8; TR Vol. 1:32, 33.)

He further stated:

> ". . . he retracted the principal items of his speech made to them on February 5. I find that in this speech he told them that he was restoring them to 44 hours per week. Rowland's testimony that shortly thereafter the employees were returned to 46½ hours per week was not challenged in this record. All the employees and Rowland agreed that at this time the 'core pile' was low and that Rowland did not have sufficient work on

> hand to keep all employees gainfully employed 46½ hours per week on rebuilding transmissions. All the employees in their testimony seemed to be in agreement that during this period some of the employees were almost continually doing 'make-work' cleaning and painting the plant. Therefore, *I credit the statement of Rowland that on February 7, he returned the employees to full work time, and that any hourly periods which the men lost during the ensuing three weeks, was due to economic conditions.*" (Italics added.) (TXD 13:6-20; TR Vol. 1:34.)

It is important to note that the Board here again disagreed with the conclusions and findings of the Trial Examiner that the overtime was restored on February 7 and that any subsequent loss of overtime was for economic reasons. There may have been a technical violation of the Act which existed February 6 and until Rowland's second talk on February 7. It is important to note also that both the Board and the Trial Examiner found Mr. Rowland's February 5 speech to be a violation of Section 8(a)(3) of the Act.

The importance of this is that the Third Amended Unfair Labor Practice Charge filed against the Employer (TR Vol. 1:6) which is the basis for this action did not charge the Employer with violation of Section 8(a)(3). The Charge stated:

> "The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (2) and (5) of the National Labor Relations Act, and

> these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act."

It is also to be noted that the General Counsel's Exceptions To The Trial Examiner's Decision (TR Vol. 1:39-44) does not allege a violation of Section 8(a)(3).

The Trial Examiner, in discussing the testimony of Harold Anderson, stated:

> "On this conflict in testimony I credit the testimony of Rowland which is not contradicted in any particular. Anderson, on the other hand, on cross-examination admitted that Rowland said something to him about changing his basis of pay to conform to interstate commerce regulations. On this point I am satisfied that Rowland is the more reliable witness." (TXD 9:50; TR Vol. 1:30.)

The Trial Examiner further stated:

> "All other allegations of the complaint, except those found to have been proven as stated above, are hereby dismissed for lack of sufficient evidence." (TXD 14:55; TR Vol. 1:35.)

The Board, in its Decision, found that Rowland's interrogation of Mr. Anderson violated Section 8(a)(1), particularly because the Trial Examiner failed to advert to it.

The Trial Examiner, in his Decision and Order, found that the Employer did not engage in anti-union conduct or unfair labor practices for the purposes

of delay so that he could undermine the Union's majority status, and he states (at TXD 12:35; TR Vol. 1:33):

> "And it is certainly not the typical card-check case, in which an employer refuses to engage in a card check, offered by the Union and insists on the election procedure for purposes of delay, which the employer uses to undermine the Union's majority."

He further states (at TXD 13:40-45; TR Vol. 1:34):

> "On this record, I cannot find that the employer sought an election for the purposes of delay while he undermined the Union's majority, as stated previously."

The Board concludes (BD 7; TR Vol. 1:55):

> "The conduct of Respondent's officials and supervisors made it clear that such refusal was in bad faith and motivated by a desire to gain time in which to undermine the Union's majority status and that such conduct was in violation of Section 8(a)(5) and (1) of the Act."

Having so credited the testimony of the witnesses, it is submitted that to disregard the evidence and draw contrary inferences is an abuse of discretion.

It is also apparent from the record as a whole that the Union had lost its majority prior to February 5, 1964 and that the threats or coercion, if any, found in the speech of Mr. Rowland on February 5 did not affect the results of the election, as the "independent and intervening acts" of the employees in withdrawing their loyalty to the Union by the execution of the

anti-Union Petition dissipated any Union majority as of that date.

In *NLRB v. Manufacturing Corp.,* 334 F. 2d 161, the Court refused enforcement of the Board's order founded on a statement that the plant should close down or automate before it would have a union; the Court stated:

> "It is too thin a crust on which to rest anything as serious as a 8(a)(1) violation. We have the impression that the Board of late has tended to overstretch on this type of issue and that, in light of Universal Camera (NLRB 340 US 474), a foundation of much greater substance is required than the isolated statements present here. We have refused enforcement in similar situations, particularly on interrogation, in recent cases."

We submit that the violations found in this case rest on "too thin a crust" on which to justify a Board's order directing the Employer to bargain, especially where the majority status of the Union was not established at the time the Employer is alleged to have refused to bargain.

IV

THE BOARD ERRED IN REVERSING THE TRIAL EXAMINER AND FINDING THE EMPLOYER VIOLATED SECTION 8(a)(2) OF THE ACT.

The Trial Examiner, in his Decision (TXD 35-45; TR Vol. 1:35), dismissed the 8(a)(2) allegations of the Complaint. Section 8(a)(2) of the Act defines a labor organization as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

As an appraisal of all the evidence by the Trial Examiner, he found as follows:

> "In the light of the above definition, I cannot find that the running of a beer-bust, and the offering of suggestions as to lights and dunk-tanks renders this Employees Committee a labor organization. Evidently, for the purpose of *dealing* with the Company 'concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.' The allegation of a violation of Section 8(a)(2) is therefore dismissed."

Contrary to the Board's conclusions, the evidence is clear and uncontroverted that the money from the coke machines was to be used for a Company picnic or "beer bust" at Millerton Lake, and it was not to be used for the purpose of financing committee activities. Thus, the financing was a financing of purely social functions.

Insofar as the improvement of lighting in the plant, more dunk tanks, and the repair of impact guns at the suggestions of this committee, this function was no more than that of a suggestion committee. There would have been no violation of the Act in an em-

ployer complying with these suggestions if there had been a certified bargaining representative.

There is no evidence in the record that would indicate that the committee was formed for the purposes of negotiating with the Employer. There is no evidence which would show that it was created as a rival to the petitioning Union. It was an attempt by the Employer to restore cooperation and to get back to normal production.

In a similar case (*Rawhide Manufacturing Co. v. NLRB,* C.A. 7, 35 LRRM 2665), the court found only "laudable cooperation" by the employer.

Even if the Board could interpret this committee to be a labor organization, as previously stated, there is no indication of financing, there is no indication of Company dominance. The committee was prohibited, according to the evidence, from discussing wages, hours and rates of pay. No one fact is conclusive (see *Rawhide Manufacturing Co.,* supra; *Coppus Engineering Corp. v. NLRB,* 39 LRRM 2315; *Hotpoint Co. v. NLRB,* 48 LRRM 2101.)

This is only another glaring example of the Board's arbitrary reversal of its Trial Examiner. This Court should sustain the Trial Examiner and reverse the Board's finding of an 8(a)(2) violation.

V

THE BOARD ERRED IN APPLYING THE BERNEL FOAM PRODUCTS DOCTRINE AND MAKING ITS ORDER REQUIRING PETITIONER TO BARGAIN.

In *Bernel Foam Products,* 146 NLRB 1227, 56 LRRM 1039, the majority decision of the Board overturned the long standing rules established in *NLRB v. Aiello Dairy Farms,* 110 NLRB 1365.

In *Aiello,* which was the policy of the Board on February 5, 1964, if a unit participated in an election despite the employer's refusal to recognize it, the union could not later base a refusal-to-bargain charge on the employer's pre-election conduct. Thus, the union had to make a choice on the two methods open to it to prove its majority. This was the policy of the Board on February 6, 1964, when the Petitioner's counsel agreed to consent to an election. Counsel for the Petitioner and the Petitioner relied upon this *Aiello* Doctrine, as the Union had indicated its choice of the method it chose to prove its majority when it filed an election petition. It should further be noted that the Union and the Employer entered into a Consent Agreement on February 14, 1964, consenting to the election procedure. At no time after the original letter (General Counsel's 17A) had been mailed to the Employer did the Union ever again request bargaining.

Some three months later, on May 4, 1964, the Board discarded this rule and decided that *"henceforth"* it would entertain a refusal to bargain charge based upon the Employer's refusal to recognize the Union

prior to an election. Under this policy, a union which has authorization cards indicating a majority at the time it demands recognition can win an order requiring the employer to bargain, despite its election loss (*Bernel Foam Products,* supra).

Since *Bernel Foam,* the Board in subsequent decisions has continued to make bargaining orders after a union-lost election has been set aside (*Irving Air Chute,* supra).

The courts, although critical of the application of this rule, have not found this to exceed the Board's powers (*Flomatic Corporation,* supra).

The Board and the courts have overlooked the real danger that lurks behind a bargaining order following a union-lost election.

This is the right guaranteed employees to "refrain" from union activities, as guaranteed by Section 7 of the Act.

Due to the unreliability of authorization cards, a signed card is not the equivalent of a vote.

This would be tantamount to saying that a political party who obtained the most registrations in January shall have its candidates elected in June on the basis of the number of signatures obtained in January.

Assuming a valid majority of authorization cards on a given date, a subsequent loss of such majority can occur four ways:

1. By *legal* persuasion of the employer in a manner protected by 8(c) and not violative of the Act.

2. By *legal* campaigning and persuasion by anti-union employees.

3. By uncoerced changes of minds of the employees.

4. By illegal employer interference and coercion.

When it makes the order, how can the Board know what was the *real cause* of the union's loss of majority status? The Board would have to look into the mind of each employee. If any one or a combination of the first three reasons set forth above caused the majority loss, the Board's order to bargain would have the result of forcing the Employer to bargain and forcing the employees into a union, unwanted by the majority, a clear violation of Section 7.

A second election is the only possible way under the Act that the employees can make their free choice, the second election to be held at some time after the coercive effect of the Employer's conduct, if any, has been dissipated.

In this case it is obvious that the interrogation of Chevoya and Napier never resulted in a change in their vote. The extrinsic evidence of the anti-union petition and tally of ballots is a clear indication of a loss of majority. There is no way the Board can determine from this record that the cause of the loss was not for reasons other than the Employer's alleged unfair labor practices. A review of the recent cases invoking the *Bernel Foam Products* "doctrine" shows

that the orders in those cases to bargain may have, and probably did, violate employees' rights under Section 7 of the Act. If any doubt does exist, it should be resolved in favor of the employees. The Board should not make an "Order to Bargain" where there can be any possibility that the loss of majority status was caused by the employees themselves or by legal persuasion. It is submitted that this is a possibility in every case where the majority of employees vote against a union.

In *Johnnie's Poultry Co.,* 59 LRRM 2117, the Court refused to enforce the Board's order due to the unreliability of authorization cards.

In the *Flomatic* case (supra), the Appellate Court suggested that the Board should be cautious in issuing bargaining orders, even where there is evidence of employer misconduct in addition to the "refusal to bargain."

The Board's order in the present case goes much further than the *Bernel Foam* and the subsequent cases. As previously stated, the Union never offered to prove its majority by authorization cards. It never advised the Employer that it possessed authorization cards. It never requested bargaining at any time, except as appears in the original letter (General Counsel's 17A). Instead, on February 4, 1964, it filed an Election Petition which in itself raises a question as to the majority status of the Union. The Union never replied to the letter from Petitioner's counsel agreeing to consent to an election.

In *NLRB v. Decker Truck Lines,* 296 F. 2d at 341:

> "An employer is under a duty to bargain as soon as the union representative presents *convincing evidence* of majority support." (Emphasis added.)

Under the Decision in the case at bar, a union need only write an employer, claiming a majority and requesting bargaining, and the duty to bargain is immediately imposed upon the employer. If the employer does not agree to bargain on the first day that he knows of the request, he is guilty of an 8(a)(5) violation. If the employer should rely on a union-filed petition, he does so at his peril. If the union loses the election, the Board will set aside the results and order the employer to bargain because he did not bargain with the union prior to the election. We submit that this is using unfair labor practice procedure as the basis of determining the representative status of a union. The procedures are mutually inconsistent and this has received judicial recognition.

In *NLRB v. Dan River Mills Inc.,* 274 F. 2d 381, the Court stated:

> "The charge and the complaint in essence claimed that the Employer is guilty of unfair labor practice because it refuses to recognize a union for a majority status.
>
> "A Representation proceeding, on the other hand, is premised on the express interim conclusion that there is doubt as to majority representation.
>
> "Both proceedings ought not be maintained simultaneously since, as the Board held here, 'a representation proceeding and an unfair labor

practice proceeding alleging refusal to bargain are mutually inconsistent.' "

There is no reason why a union should not be compelled to resort to election procedure in establishing its majority status, rather than seeking de facto certification as the majority's representative by the use of unfair labor practice proceedings.

The conduct of the Union in filing an Election Petition led the Petitioner to believe that the Union had concurred in Petitioner's belief that there was a question as to the majority status. To allow this procedure is to permit a union to obtain recognition by a Board's order without an election. Congress provided adequate election procedures and a method of Board certification of results of elections (Section 9) to carry out the purposes of the Act. Unfair labor practices should not be resorted to, to circumvent the established procedure.

The Board should not have applied its *Bernel Foam* rule retrospectively. Such a policy has been held arbitrary and unlawful.

Pedersen v. NLRB, 38 LRRM 2227, at 2229 (and cases cited therein).

The Court here said:

"The rationale of these cases limiting the Board's power to act retroactively is that such retroactive action results in a species of entrapment. Persons who have relied on the Board's stated policy suddenly find themselves penalized for their conduct. In such a situation the unfairness and hardship to the individual penalized justify a requirement

that the Board point to clear statutory authority for its action."

It is Petitioner's position that the ruling in *Bernel Foam* is wrong and violates the intent of Congress.

Before the 1947 Amendments to the Wagner Act, the Board was empowered to determine representation questions by a secret ballot election or "any other suitable method." This was held to include card counts of authorization cards.

The 1947 Amendments removed the language, "any other suitable method."

It is apparent that Congress intended the Board to decide questions of representation only by secret ballot election. It follows that such a determination by unfair labor practice procedures is an abuse of the Board's authority.

In 1964, with "new Board faces and new ideas", *Aiello* was overruled.

The card count rule of *Bernel Foam* completely lacks the laboratory conditions that the Board has said must attend the selection of bargaining representation.

The policy of making a card tantamount to a vote, in view of the proven unreliability of cards (*Johnnie's Poultry Co.,* supra), is forcing the unwanted bargaining agent upon employees as punishment for the employer's transgressions.

This Court should re-examine the whole rule, in view of the torrent of criticism which now exists.

refusal to bargain on the same date he first had knowledge of a request to bargain.

The record does not show any evidence or testimony which would substantiate that the Union represented a majority on February 5, 1964.

The Trial Examiner, after weighing all the evidence, found that the Employer did not refuse to bargain or engage in unfair labor practices for the purpose of gaining time in which to undermine the Union's majority. Yet, the National Labor Relations Board, more than 2,500 miles away, without benefit of seeing the witnesses, observing their demeanor, bias and prejudice, and without being able to determine the veracity and trustworthiness of their testimony, does from the cold record reverse the Trial Examiner on every important finding of credibility. In such a case as this, where the Board has completely reversed the Trial Examiner, who "lived with the case", the Court should give the record special scrutiny.

Universal Camera Corp. v. NLRB, 340 US 474;
NLRB v. Porter County Coop, 314 F. 2d 133, 144;
NLRB v. New England Web Inc., 309 F. 2d 696, 700.

We request that the Court consider carefully the *Bernel Foam* doctrine, especially as it affects the rights of employees under Section 7 of the Act, and the fact that such doctrine was applied retrospectively.

In this connection, we submit that the primary purpose of the Act is to protect *employees* in the free

exercise of their rights; this to the exclusion of the wishes and desires of the Employer or the Union. By enforcing the Board's Order in this case, the primary purpose of the Act will be defeated, the wishes of a majority of the employees negated and a minority union given representative status.

District Judge Timbers, in his well reasoned concurring and dissenting opinion (in *NLRB v. Gotham Shoe Mfg. Co.,* 61 LRRM, at 2192), quoting in part from Judge Anderson's language in *Flomatic,* supra, stated:

> " 'A bargaining order . . . is strong medicine'. In the instant case, it would be the wrong prescription altogether; whatever its deterrent effect might be on the employer, as a cure for the primary patient, the employees, it would be far worse than the ailment."

For these reasons, the Petitioner respectfully requests that the Decision and Order of the Board be set aside and the cross-petition for enforcement be denied.

Dated, Fresno, California,
June 3, 1966.

Respectfully submitted,
DOTY, QUINLAN & KERSHAW,
Counsel for Petitioner.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL K. DOTY,
Attorney.